that any reasonable Commissioners could reach, viz. that there is nothing in the evidence capable of rebutting the *prima facie* inference that in the relevant periods of assessment the Company was carrying on a business of letting out its premises for rent. On the contrary the evidence serves only to reinforce that *prima facie* inference.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal be allowed, the order of the Federal Court set aside and the order of the High Court restored. They will further advise that the respondent pay the costs of this appeal but that there be no order as to the costs in the Federal Court or the High Court.

Appeal allowed.

Solicitors: *Freshfields; Stephenson Harwood.*

INTERNATIONAL INVESTMENT LTD. v. COMPTROLLER-GENERAL OF INLAND REVENUE

[P.C. (Lord Diplock, Viscount Dilhorne, Lord Fraser of Tullybelton, Lord Keith of Kinkel and Sir Robin Cooke) June 19, 20 and July 18, 1978]

[Privy Council Appeal No. 20 of 1976]

Revenue Law — Income Tax — Transfer of immovable property by company to another company in exchange for shares — Isolated transaction — Whether it constituted carrying on of a trade or business — Whether profits liable to income tax — Income Tax Ordinance, 1947, s. 10(1)(a).

This was an appeal from the decision of the Federal Court ([1975] 2 M.L.J. 208). The appellant company, one of whose objects was to traffic and otherwise deal in or turn into account immovable property, had acquired certain lands and had begun building operations on the lands. Subsequently it agreed to sell the lands and the uncompleted building on it to another company in exchange for shares in the company. These shares were subsequently transferred by the company. The company was assessed to tax on the profits obtained by it. On appeal the Special Commissioners upheld the assessment and a further appeal to the High Court by way of case stated was dismissed ([1973] 2 M.L.J. 10). An appeal from the judgment of the High Court was dismissed by the Federal Court and the appellant company appealed. It was argued on behalf of the appellant that the profit was not and could not be taxable as income under section 10(1)(a) of the Income Tax Ordinance, 1947, because the transaction from which it was received was an isolated transaction which did not constitute the carrying on of a trade or business. It might have been an adventure in the nature of trade but it could not have been trading because trading necessarily involved some repetition or continuity of operation and that element was lacking in the case. It was also argued that in any event the facts showed that when the appellant company acquired and developed the property, it was not trafficking or dealing in land but was investing in land, and any profit on the realisation of its investment was not of an income nature and was not assessable to income tax.

Held, dismissing the appeal: (1) a company whose business is or includes trading *prima facie* begins to trade as soon as it embarks upon the first transaction of a trading nature. The transaction in this case could therefore constitute trading even if it was isolated;

(2) there was evidence in this case on which the Special Commissioners could conclude that the appellant company was carrying on a trade in immovable property and there was no justification for reversing the determination of the Special Commissioners as it had not been shown that they had misdirected themselves in law or proceeded without sufficient evidence in law to justify their conclusion.

Cases referred to:-

(1) *D.E.F. v. Comptroller of Income Tax* [1961] M.L.J. 55.

(2) *E. v. Comptroller-General of Inland Revenue* [1970] 2 M.L.J. 117.

(3) *American Leaf Blending Co. Sdn. Bhd. v. Director-General of Inland Revenue* [1978] 2 M.L.J.

(4) *Commissioner for Inland Revenue v. Leydenberg Platinum Ltd.* [1929] S.A.L.R. 137.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Barry Pinson Q.C. (*John Gardiner* and *T.F. Chong* with him) for the appellant.

P. Medd Q.C. (*N. Lyell* with him) for the respondent.

Cur. Adv. Vult.

Viscount Dilhorne (delivering the judgment of the Board): The issue raised in this appeal is whether the Special Commissioners of Income Tax in Malaysia were entitled on the facts before them to find, as they did, that a profit made by the appellant company on realisation of immovable property was chargeable to income tax under the Income Tax Ordinance, 1947. The appellant company appealed by way of Case Stated against the determination of the Special Commissioners, and their appeal was dismissed by the High Court of Malaya (H. S. Ong J.). An appeal from his judgment was dismissed by the Federal Court of Malaysia (Gill C.J. Malaya, Raja Azlan Shah F.J. and Wan Suleiman F.J.). The present appeal is against the judgment of the Federal Court.

The appellant company was incorporated in 1962 with the objects *inter alia* of trafficking and otherwise dealing in or turning to account lands buildings and immovable property of any description. Its Memorandum of Association also included a wide variety of other objects including developing land and investing in shares and securities. Its authorised share capital was originally $500,000 in shares of $100 each, increased in 1963 to $5 million. On December 31, 1962 its issued share capital was $300,000 fully paid. By December 31, 1963 this had been increased to $500,000, and application and allotment moneys of a further $500,000 had been received for shares which had not then been allotted. In 1962 and 1963 it purchased several pieces of land in Penang Road, Penang, which together formed a block, for a total price of $337,273.71. After paying compensation to occupiers of some old houses on part of the land, it demolished the existing houses and entered into contracts for erection of a six storey shopping arcade and hotel to be known as the International Building. In 1962 it entered into negotiations for letting the proposed hotel but the negotiations proved abortive. In 1963 it received rents of $7,044.00 from the arcade.

On October 16, 1963 at an Extraordinary General Meeting of the members of the appellant company the following Special Resolutions were passed:

"1. That the business and undertaking of the Company be reconstructed and after such reconstruction to expand its business of investments in and the holdings of securities.

2. That the Company do convey its property known as Lots Nos. 14(1), 14(2), 15(2), 16(1), 30, 31 and 32 T.S. 16 N.E.D. Penang, together with the building erected thereon to Island Hotels & Properties (Malaysia) Limited in consideration of the issue of 2,846,300 shares of $1 each in the said Island

Hotels & Properties (Malaysia) Limited all credited as being fully paid.

3. That the Company execute a Deed of Guarantee with Island Hotels & Properties (Malaysia) Limited whereby the Company undertake to complete the erection of the building now under construction on Lots [numbered as above] to construct a driveway and car park and to undertake the fittings, fixtures, escalators, lifts, furnitures, telephone with P.A.B.X. equipment and all other things according to all the detailed plans and specifications a copy of which will be annexed to the Deed of Guarantee in consideration of the issue of 903,700 shares of $1 each in the said Island Hotels & Properties (Malaysia) Limited as being fully paid.

4. ...."

In accordance with these Resolutions the appellant company transferred the International Building and the land on which it stood to Island Hotels & Properties (Malaysia) Limited ("Island Hotels") and undertook to complete the building. In exchange it received 3,750,000 shares of $1 each in that company. It was this transfer to Island Hotels which gave rise to the profit on which income tax has been assessed and is disputed. The fact that the consideration was received in shares and not in cash is immaterial, as the Special Commissioners rightly held. The profit is the difference between the cost of the property (including the expenditure on erecting the International Building) and the value of the shares in Island Hotels received in exchange for it at the time of the exchange. The profit was assessed by the Comptroller of Income Tax at $1,704,061 and that amount was included in a Notice of Amended Assessment dated May 25, 1967 for the year of assessment 1964. (The year of assessment is the calendar year.) The appellant company appealed against the inclusion of that amount in the assessment. No question is raised with regard to the amount of the profit.

To complete this part of the narrative it is convenient to set out here the following passage from the Findings of Fact by the Special Commissioners, the significance of which will appear later:

"Subsequently, all of these shares in the Island Hotels and Properties (Malaysia) Limited were transferred by the Appellant Company as follows:

1,000,000 shares to Disco Limited on 2.12.63;

1,500,000 shares to Tan Sim Hoe on 4.1.64;

1,250,000 shares to Disco Limited on 4.1.64.

There was no resolution made by the Appellant Company that these shares be held by Disco Limited or by Tan Sim Hoe on trust for the Appellant Company."

At all relevant times the shares in the appellant company were held 50% by Tan Sim Hoe and his wife and 50% by Chew Ming Teck and his wife. Chew Ming Teck was a principal shareholder in Disco Ltd.

In 1962 the appellant company held shares to a total nominal value of $175,000 in four other companies but these holdings were all "transferred away" during 1963. The appellant company has not constructed any other building of a similar nature to the International Building and, so far as appears, they have not constructed any other building of any kind.

The statutory provision under which the income tax was charged is the Income Tax Ordinance, 1947, section 10(1)(a), which is in the following terms:

"10(1) Income tax shall, subject to the provisions of this Ordinance, be payable at the rate or rates specified hereinafter for each year of assessment upon the income of any person accruing in or derived from the Federation or received in the Federation from outside the Federation in respect of —

(a) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised; ..."

There was at the relevant date no provision in Malaysian legislation corresponding to the definition of "trade" in what is now section 526(5) of the United Kingdom Income and Corporation Taxes Act 1970, which provides that "'trade' includes every trade, manufacture, adventure or concern in the nature of trade". Their Lordships were informed that the law of Malaysia had now been amended in this respect, but that the amendment does not apply to the year of assessment with which this appeal is concerned.

The argument for the appellant company had two main branches. First it was said that the profit with which this appeal is concerned was not, and could not be, taxable as income under section 10(1)(a) because the transaction from which it was received was an isolated transaction which did not constitute the carrying on of a trade or business. It might have been an adventure in the nature of trade, but it could not have been trading because trading necessarily involves some repetition or continuity of operation, and that element was lacking here. The second argument was that in any event the facts showed that, when the appellant company acquired and developed the property at Penang Road, it was not trafficking or dealing in land but was investing in land, and that any profit made on the realisation of its investment was not of an income nature and was not assessable to income tax.

In support of the former argument much reliance was placed on the cases of *D.E.F.* v. *Comptroller of Income Tax*[1] and *E.* v. *Comptroller-General of Inland Revenue.*[2] The former case is a decision of the Court of Appeal of Singapore and the latter is a decision of the Federal Court itself. Both these cases decided that profits from isolated transactions, not forming part of the ordinary business of the taxpayer, were not taxable as income. In both cases however the taxpayer was an individual and the cases were distinguished by Raja Azlan Shah F.J. (with whose judgment the other members of the Federal Court concurred) on the ground that the relevant tests for individuals and companies were not the same. Their Lordships agree with the learned judge. In the very recent case of *American Leaf Blending Co. Sdn. Bhd.* v. *Director-General of Inland Revenue,*[3] where the advice of this Board was delivered by Lord Diplock, attention was drawn to the contrast between a private individual, whose mere receipt of rents from property that he owns raises no presumption that he is carrying on a business, and a company incorporated for the purposes of making profits, which is *prima facie* carrying on a business where it makes gainful use of its property by letting it out for rent. The same contrast applies to receipts from other activities. As their Lordships understood the argument of Mr. Pinson for the appellant company, he did not dispute that this was a business transaction, but he submitted that it was not in the course of carrying on the particular

business of dealing or trading in land because it was an isolated transaction, and that it would not have been in the course of dealing in land even if such dealing had been the company's only object. Their Lordships are unable to accept that submission. In their view a company whose business is, or includes, trading *prima facie* begins to trade as soon as it embarks upon the first transaction of a trading nature. The same would apply to an individual who had set himself up as a trader and declared his intention of trading if the transaction fell within the scope of his trade; only if he had no business, or if the isolated transaction was not within the scope of his trade, would the result be otherwise. No doubt trading normally involves an element of repetition or continuity, but it has to begin sometime and even if it only continues for a short time and only includes one transaction, that does not by itself mean that the transaction cannot constitute trading — see *Commissioner for Inland Revenue* v. *Leydenberg Platinum Ltd.*[4]

The second argument on behalf of the appellant company was that the profit was derived from investing in land and that it was therefore of a capital nature. The argument turns entirely upon the facts. The most important facts which, in the opinion of their Lordships, the Special Commissioners were entitled to regard as indicating that the appellant company was carrying on the business of dealing in land and that the Penang Road transaction forms part of that business are as follows. The importance, if any, to be attached to each item is entirely for the Special Commissioners to judge.

First, the appellant company's accountants wrote on August 16, 1962, in reply to an enquiry on a standard form from the Inland Revenue, stating that "the nature of the business conducted by the company is dealing in immovable property and land development". In their Lordships' view that statement is certainly capable of being read as a direct admission that the company was carrying on the business of dealing in land. Whether it should be so read, and, if so, what importance should be attached to it, are questions for the Special Commissioners.

Second, the work in progress on the International Building was shown in the balance sheet at December 31, 1962 under Current Assets. That is difficult to reconcile with another entry in the balance sheet showing the land on which the building was being erected as a Fixed Asset, but it is consistent with the fact that the building work during 1962 and 1963 was entirely financed by bank overdraft and other short-term loans. The Special Commissioners were fully entitled to refuse, as they did, to regard the entry under Current Assets as a mistake and to regard it as an indication that the appellant company was treating the building as trading stock, not as an investment.

Third, the way in which the appellant company dealt with the shares in Island Hotels is of importance. The contention for the appellant company was that the Special Resolutions of October 16, 1963 showed that, when the company accepted the shares in Island Hotels in exchange for the immovable property, it was merely reconstructing its business in order to expand its investments. But this explanation was rejected by the Special Commissioners who found that as the shares had been "transferred away" within about three months after the Resolutions had been passed it was "difficult to accept" that the true object of acquiring these shares was in order to expand its investments, and that that was confirmed by the fact that its other investments of $175,000 nominal value were also "transferred away" by the end of 1963.

It was contended on behalf of the appellant company that the shares in Island Hotels had not been sold, but were "transferred away" merely to be held in trust for the company. If that was indeed the case, the onus was on the appellant company to prove it—see Income Tax Act, 1967, Schedule 5, paragraph 13, and Income Tax Ordinance, 1947, section 76(3). They did not do so. The finding of fact by the Special Commissioners to the effect that there was no Resolution by the appellant company that the shares were to be held in trust for it has already been quoted. Moreover the balance sheet as at December 31, 1963 contains a statement (in Note 3) that 1 million shares of $1 each in Island Hotels had been "sold" to Mr. Chew Ming Teck, and the balance sheet itself shows him as a debtor for $1,000,000. The balance sheet as at December 31, 1964 is not among the annexures to the findings of the Special Commissioners. It is somewhat remarkable that, notwithstanding the "sale" of 1,000,000 shares in Island Hotels in 1963, the balance sheets at December 31, 1965 and 1966 show the Fixed Assets of the appellant company as including 3,750,000 shares in Island Hotels; each of these balance sheet includes a note by the auditors stating that they "understood" that trust deeds had been executed in relation to these shares but that the deeds had not been produced for their inspection. In these circumstances, where the manner of dealing with the shares remains so obscure and where the appellant company was the only party in a position to clear it up, their Lordships are not surprised at the Special Commissioners' conclusion to the effect that the appellant company had failed to discharge the onus placed upon it.

There are no doubt considerations pointing the other way, and it may be that if the Special Commissioners had come to a conclusion in favour of the appellant company their determination could not have been successfully attacked. But their Lordships agree with and adopt the following statement from the judgment of Raja Azlan Shah F.J.:

> "... there is no justification for reversing the determination of the Special Commissioners unless they had misdirected themselves in law, or proceeded without sufficient evidence in law to justify their conclusion."

In their Lordships' opinion the determination of the Special Commissioners is not open to criticism on either of these grounds.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal be dismissed and that the appellant company pay the costs of this appeal.

Appeal dismissed.

Solicitors: *Maxwell Batley & Co.; Stephenson Harwood.*